

BEFORE THE DEPARTMENT OF NATURAL RESOURCES
AND CONSERVATION OF THE STATE OF MONTANA

In the matter of the amendment of ARM)	NOTICE OF AMENDMENT
36.10.132, and adoption of New Rule I)	AND ADOPTION
(36.10.133) and New Rule II (36.10.134))	
regarding firewarden qualifications,)	
duties, and legal representation for state)	
firefighters)	

To: All Concerned Persons

1. On October 23, 2008, the Department of Natural Resources and Conservation published MAR Notice No. 36-22-132 regarding a notice of public hearing on the proposed amendment and adoption of the above-stated rules at page 2246 of the 2008 Montana Administrative Register, Issue No. 20.

2. The department has amended ARM 36.10.132 exactly as proposed and adopted New Rule I (36.10.133) and New Rule II (36.10.134) exactly as proposed.

3. The following comments and testimony were received and appear with the department's responses:

COMMENT 1

A commenter suggested adding "or appointed" following "a person employed" in ARM 36.10.132(6)(a), i.e., "(6) 'Firewarden' includes the following: (a) a person employed or appointed by a local government fire protection...". The commenter expressed concern that as worded, the definition would allow DNRC to appoint firewardens who are not employees of the state or a county.

RESPONSE 1

DNRC appreciates this comment. Inserting the words "or appointed" in front of "by a local government fire protection" would violate 2-4-305(6)(a), MCA, which provides that if a statute gives an agency the authority to adopt administrative rules, the rules must be consistent, and not in conflict with the statute. 76-13-104(7), MCA, provides DNRC with the sole mandate to appoint firewardens in the numbers and localities it considers necessary. 76-13-104(7), MCA, also mandates that DNRC adopt rules prescribing the qualifications and duties of firewardens that are in addition to those found in 76-13-116, MCA. The DNRC may not, through administrative rule, authorize a local government entity to appoint a firewarden when the Legislature has expressly provided DNRC with the sole mandate to do so. Doing so would be inconsistent, and in conflict with (and outside of the scope of) the rulemaking authority granted DNRC in 76-13-104(7), MCA.

COMMENT 2

A commenter asked why DNRC proposed to amend the term "recognized fire protection agency," currently provided for in ARM 36.10.132(10), by deleting "fire

protection." The commenter stated that the term "recognized fire protection agency" was carefully articulated during the House Joint Resolution 10 study that arose out of the 2005 legislative session.

RESPONSE 2

Deleting "fire protection" from ARM 36.10.132(1), the administrative rule that employs and defines the term "recognized fire protection agency," brings that term into conformity with the term "recognized agency," employed in and defined at 76-13-102(8), MCA. For reasons similar to those described in Response 1, employing a term in an administrative rule that has the same definition as a different, albeit similar, term found in a statute is problematic because doing so may bring the term employed in the administrative rule into conflict with the statutory term, or may lead to an inconsistency between the administrative rule and the statute in which the term is employed and defined.

COMMENT 3

A commenter suggested that the proposed rules should identify where the word "employed" (as that word is used in the proposed definition of "firewarden" in ARM 36.10.132) is defined.

RESPONSE 3

Although the department appreciates this comment, it feels that showing in the proposed rule where the word "employed" is defined is too complicated an issue to address in these rules and is outside of the scope of the specific rulemaking authority granted the department by the Legislature. To the extent a dispute arises concerning whether someone is "employed," it will be necessary that the dispute is addressed on a case-by-case, fact-specific basis.

DEPARTMENT OF NATURAL RESOURCES AND CONSERVATION

/s/ Mary Sexton

MARY SEXTON

Director

Natural Resources and Conservation

/s/ Mark Phares

MARK PHARES

Rule Reviewer

Certified to the Secretary of State on December 1, 2008.